



**U.S. Department of Justice**  
Civil Division  
Washington, DC 20530  
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**By ECF**

Molly C. Dwyer, Clerk  
The James R. Browning Courthouse  
95 7th Street  
San Francisco, CA 94103

Re: *Sierra Club v. Trump, California v. Trump*,  
Nos. 19-16102, 19-16300, 19-16299, 19-16336  
Notice under Federal Rule of Appellate Procedure 28(j) and Circuit Rule  
28-6.

Dear Ms. Dwyer:

On September 5, the United States Government Accountability Office (GAO), in response to a request from three Senators, issued the attached legal opinion addressing several appropriations questions presented in this appeal. The GAO concluded that DoD acted consistently with Section 8005 and 10 U.S.C. § 284 in transferring and using its “fiscal year 2019 appropriations for the purpose of constructing fences at the southern border of the United States” to support DHS’s drug-interdiction efforts. GAO Opinion B-330862 (Op.) 1 (<https://www.gao.gov/mobile/products/B-330862>); accord Gov’t Br. 41-48; Resp.-Reply 25-33, 39-41.

The GAO concluded that DoD’s transfer was for an “unforeseen military requirement” under Section 8005 because DHS’s Section 284 request “was unforeseen at the time of [DoD’s] budget request,” and DoD’s “authority to support DHS by constructing fences at the southern border under section 284 only materialized when DHS requested DOD’s assistance on February 15, 2019, and DOD accepted that request.” Op. 7-8. The item had not been “denied by Congress” because DoD had not requested funds to support DHS, “so there was nothing for Congress to deny with respect to DOD.” Op. 9. The GAO “reached similar conclusions in prior opinions.” Op. 10. It also concluded that “the fence construction requested by DHS meets the conditions of section 284.” Op. 12. The GAO’s conclusions refute plaintiffs’ suggestions that the government’s position is wrong and, indeed, “implausible” or “not credible.” Organizations Br. 41; States Br. 14-15.

The GAO’s conclusion that DoD complied with appropriations law, while not binding, is informative as the expert view of an independent, nonpartisan arm of Congress charged with overseeing Executive spending. Moreover, the GAO’s conclusion also underscores the importance of rigorously applying the zone-of-interests requirement to statutes governing

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internal budget transfers. Section 8005 governs the relationship between Congress and DoD in the appropriations process. *See* Br. 26-30; Resp.-Reply 8-11. Both the Executive Branch and an independent arm of the Legislative Branch have concluded that DoD complied with Section 8005. Plaintiffs, who assert aesthetic, recreational, and environmental interests, are not proper parties to ask the Judicial Branch to second-guess the judgment of the political branches on this budgetary matter.

Sincerely,

*s/ Anne Murphy*

ANNE MURPHY  
Attorney, Appellate Staff  
United States Department of Justice

cc: Counsel